

THE GOVERNMENT
PROCUREMENT
REVIEW

SEVENTH EDITION

Editors

Jonathan Davey and Amy Gatenby

THE LAWREVIEWS

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CONTENTS

PREFACE.....	v
<i>Jonathan Davey and Amy Gatenby</i>	
Chapter 1	ARGENTINA..... 1
<i>Juan Antonio Stupenengo and Santiago José Barbarán</i>	
Chapter 2	AUSTRALIA..... 14
<i>Geoff Wood, Anne Petterd and Sally Pierce</i>	
Chapter 3	AUSTRIA..... 26
<i>Philipp J Marboe</i>	
Chapter 4	BELGIUM 37
<i>Frank Judo, Stijn Maeyaert and Klaas Goethals</i>	
Chapter 5	BRAZIL..... 51
<i>Mauro Hiane de Moura and Filipe Scherer Oliveira</i>	
Chapter 6	BULGARIA..... 62
<i>Katerina Novakova and Radoslav Mikov</i>	
Chapter 7	CANADA..... 74
<i>Theo Ling and Randeep Nijjar</i>	
Chapter 8	EUROPEAN UNION 89
<i>Clare Dwyer, Michael Rainey and Andrew Carter</i>	
Chapter 9	GERMANY..... 103
<i>Jan Bonhage and Simone Terbrack</i>	
Chapter 10	ITALY 116
<i>Filippo Pacciani and Ada Esposito</i>	

Contents

Chapter 11	MEXICO	132
	<i>Federico Hernández A, Ana P Rumualdo Flores and Julio S Zugasti González</i>	
Chapter 12	PORTUGAL.....	142
	<i>Paulo Pinheiro, Rodrigo Esteves de Oliveira, Catarina Pinto Correia and Ana Marta Castro</i>	
Chapter 13	RUSSIA	155
	<i>Olga Revzina, Lola Shamirzayeva and Olga Vasilyeva</i>	
Chapter 14	SPAIN.....	169
	<i>José Alberto Navarro Manich</i>	
Chapter 15	UNITED KINGDOM	180
	<i>Amy Gatenby, Bill Gilliam, Ryan Geldart and Paul Minto</i>	
Chapter 16	UNITED STATES	197
	<i>Daniel Forman, Adelia Cliffe, Judy Choi and Christian Curran</i>	
Chapter 17	VENEZUELA.....	208
	<i>José Gregorio Torrealba R</i>	
Appendix 1	ABOUT THE AUTHORS.....	217
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	231

PREFACE

It is our pleasure to introduce the seventh edition of *The Government Procurement Review*.

Our geographic coverage this year remains impressive, covering 17 jurisdictions, including the European Union, and the continued political and economic significance of government procurement remains clear. Government contracts, which are of considerable value and importance, often account for 10 to 20 per cent of gross domestic product in any given state, and government spending is often high profile, with the capacity to shape the future lives of local residents.

It is frankly depressing to have to refer in the future tense to Brexit for the third successive edition. However, it remains the case that the United Kingdom continues to recognise the importance of procurement law both during and beyond any ratified transitional period. Her Majesty's Government has pronounced itself committed to the need for continued regulation of procurement, and has secured approval from the World Trade Organisation for the United Kingdom to become party to the Agreement on Government Procurement (GPA) in its own right, rather than through the European Union, once Brexit happens.

In the UK and EU we are starting to see increasing use of the national legislation emerging from the Concessions Directive and there is also a growing body of case law on the Hamburg exception.

UK practitioners are coming to terms with the Court of Appeal's landmark decision in the *Faraday* case, which has called into question the use of what had become reasonably widely utilised approaches to avoid the application of the procurement rules where a developer initially had a right (rather than an obligation) to carry out works. That case will continue to have wide-ranging implications for real estate development affected by procurement law.

Looking further afield, it is clear that law and policy on government contracting continue to be shaped by political developments at national and international level:

- a* with GPA parties giving formal approval in October, Australia joined the (revised) GPA on 5 May 2019;
- b* new international agreements on government procurement have emerged in the US, Mexico, Canada Trade Agreement (USMCA), executed in December to replace NAFTA, and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which entered into force between Canada, Australia, Mexico, Japan, New Zealand and Singapore in December;
- c* US sanctions against Venezuela constrain US financing for Venezuelan public bodies and the state-owned Petroleos de Venezuela, with the future outlook for government purchasing and procurement policy very much dependent on the outcome of the current political situation; and

- d* Brazil, under a liberal political agenda, has launched a programme of privatisation involving the sale of public assets and the award of contracts for the management of public services across a range of economic sectors.

When reading chapters regarding European Union Member States, it is worth remembering that the underlying rules are set at EU level. Readers may find it helpful to refer to both the European Union chapter and the relevant national chapter, to gain a fuller understanding of the relevant issues. So far as possible, the authors have sought to avoid duplication between the EU chapter and national chapters.

Finally, we wish to take this opportunity to acknowledge the tremendous efforts of the many contributors to this seventh edition as well as the tireless work of the publishers in ensuring that a quality product is brought to your bookshelves in a timely fashion. We hope you will agree that it is even better than the sixth edition and we trust you will find it to be a valued resource.

Jonathan Davey and Amy Gatenby

Addleshaw Goddard LLP

London

May 2019

RUSSIA

*Olga Revzina, Lola Shamirzayeva and Olga Vasilyeva*¹

I INTRODUCTION

Broadly speaking, Russian government procurement (also referred to as public procurement) legislation provides for two different regulatory regimes depending on the contracting body: either public authorities or public entities. This chapter is focused on government procurement related to public authorities unless otherwise stipulated. The key law regulating procurement involving public authorities and some related entities (contracting authorities) is Federal Law No. 44-FZ on the Contract System in State and Municipal Procurement of Goods, Works and Services, dated 5 April 2013 (Law No. 44-FZ). There are also numerous subordinate legal acts adopted in accordance with federal procurement legislation.

With regard to state defence procurement, in addition to general rules established by Law No. 44-FZ, some peculiarities are set out in a separate law, Federal Law No. 275-FZ on State Defence Procurement, dated 29 December 2012. Generally, the procurement regime under Law No. 44-FZ applies to utilities procurement; however, there are also basic laws regulating certain utilities (water and heat supply systems, etc.) that should be considered.

The EU procurement directives and the World Trade Organization (WTO) Agreement on Government Procurement (GPA) do not apply in Russia. However, on 29 May 2013 the WTO Committee on Government Procurement granted Russia observer status, which may represent a first step towards Russia's possible accession to the GPA as a full party in the near future.

The government and the Ministry of Economic Development are the key bodies responsible for setting government purchasing or procurement policy and guidelines. The control function in the area of compliance with procurement legislation is mainly exercised by the Federal Antimonopoly Service of Russia (FAS), which investigates different violations in this area, challenges procurement proceedings, brings suits, etc. Similar control powers are vested in the Federal Service for Defence Contracts with regard to government defence procurements. In practice, the FAS also actively participates in developing government procurement legislation.

On 5 April 2013, Federal Law No. 44-FZ on the Contract System of Procurement of Goods, Works and Services for State and Municipal Needs was adopted, with the majority of the provisions becoming effective as of 1 January 2014. This Law replaced and modernised

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the previous regulation of government procurement based on Federal Law No. 94-FZ on Placement of Orders for Delivery of Goods, Performance of Works and Rendering Services for State and Municipal Needs of 21 July 2005.

Among other new provisions, the Law introduced:

- a* a system of planned procurement based on annual and three-year procurement plans;
- b* additional methods of selecting a supplier, including rules relating to requests for proposals, tenders with limited participation and two-stage tenders;
- c* monitoring, auditing and public oversight of procurement; and
- d* anti-dumping measures intended to ensure that procurement participants comply with their price undertakings and select suppliers on the basis of important criteria other than price.

This Law led to the adoption of many new subordinate legal acts, and has been updated numerous times since its enactment to keep up with economic policy developments and new practical challenges.

Law No. 44-FZ regulates relations aimed at meeting state and municipal needs for the purpose of enhancing the productivity and efficiency of the procurement of goods, works and services, promoting transparency and preventing corruption and other abuses in this area. Thus, the contract system under Law No. 44-FZ is based on the following principles:

- a* uniformity of the contract system;
- b* transparency;
- c* competition;
- d* professionalism of contracting authorities;
- e* promotion of innovation;
- f* responsibility for productivity in meeting state and municipal needs; and
- g* efficiency of procurement.

However, while certain principles are developed further in the provisions of the relevant procurement laws, some are more general in nature. Consequently, whether the action of a contracting authority will be in accordance with the legal principles may depend on how those are interpreted by the Russian courts and other competent bodies.

With regard to procurement involving public entities (as opposed to public authorities), the main law in this area is Federal Law No. 223-FZ on the Purchase of Goods, Works and Services by Certain Types of Legal Entities, dated 18 July 2011 (Law No. 223-FZ), which provides for a more liberalised procurement mechanism in comparison with Law No. 44-FZ. The following entities fall within the scope of this law:

- a* state corporations, state-owned companies and public companies;
- b* natural monopolies;
- c* companies engaged in regulated activities in the fields of electric power, gas, heat, water, etc.;
- d* autonomous institutions;
- e* legal entities where the Russian Federation holds a stake exceeding 50 per cent;
- f* subsidiaries where the entities listed above hold a stake exceeding 50 per cent;
- g* subsidiaries where the above-mentioned subsidiaries hold a stake exceeding 50 per cent;

- b* budget financed institutions in certain cases; and
- i* state and municipal unitary enterprises in certain cases (e.g., when their procurements are made based on the grants provided by Russian and foreign individuals and legal entities).

Law No. 223-FZ leaves determination of the appropriate procurement procedure to the discretion of the contracting entity (and in this respect is more flexible than Law No. 44-FZ). Thus, contracting entities should adopt their own procurement policies, including the procedure for preparing for and carrying out procurement by competitive and non-competitive methods, as well as conditions for its application, procedure for conclusion and execution of contracts, and other related provisions. Until a contracting entity approves its own procurement policy, it must follow the procedures established by Law No. 44-FZ.

From 31 December 2017, certain executive authorities or entities may adopt model procurement policies and determine the entities that must follow such model policies, while elaborating their own.

Model policies must establish a date by which all the relevant policies will need to be brought in line with the model policy, and contain provisions regarding the procurement procedure, method and conditions of its application, and the term for entering into the agreement as a result of the competitive procurement, which may not be changed in policies elaborated pursuant to the model one. In addition, subsidiaries listed under the above-mentioned items (f) and (g) regarding the types of public entities defined under Law No. 223-FZ may join the procurement policy established by their parent company.

Following a legislative change that introduced the concept of public companies, these companies were included in the scope of Law No. 223-FZ. Public companies are defined as unitary non-commercial organisations established by Russia, having powers and authority of public character and acting in the interest of the state and society.

State and municipal unitary enterprises, except for a limited number of cases, have been removed from the scope of Law No. 223-FZ. Starting from 1 January 2017, these enterprises must conduct procurement in accordance with the more stringent provisions of Law No. 44-FZ. Unitary enterprises may nonetheless engage in procurement under Law No. 223-FZ in a limited number of instances, provided that they have adopted their procurement policy and published it in the unified information system within the requisite deadline.

II YEAR IN REVIEW

Since January 2019, a significant number of changes in procurement legislation have entered into force. An extensive package of amendments was adopted with respect to electronic forms of procurement. A number of changes were adopted regarding the enforcement of the contract, the possibility of changing the contract price and purchasing from a sole source.

Among other legislative changes, the Russian government has approved a plan for transformation of the business climate, which envisages a number of procurement reforms (see the Decree of the Government of the Russian Federation of 17 January 2019 No. 20-r). For example, by 2020, the government plans to increase to 18 per cent the proportion of procurement procedures held under Law No. 223-FZ whose participants are limited to small- and medium-sized businesses.

Administrative and criminal liability measures have been introduced for providing a deliberately false expert opinion in the procurement process under Law No. 44-FZ (Federal Laws No. 510-FZ and 520-FZ of 27 December 2018). In addition, Federal Law No. 99-FZ, according to which a wider range of individuals involved in the procurement under Law No. 44-FZ may be subject to criminal liability (see Articles 200.4 and 200.5 of the Criminal Code of Russia), entered into force in 2018.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

A wide range of bodies are deemed contracting authorities pursuant to Law No. 44-FZ, including the following:

- a* state (federal or regional) and municipal authorities;
- b* state and municipal unitary enterprises;
- c* the State Atomic Energy Corporation Rosatom;
- d* the State Corporation for Space Activity Roskosmos;
- e* regulatory bodies of state non-budgetary funds (pension fund, social insurance fund, federal and territorial compulsory medical insurance funds);
- f* treasury enterprises that perform state functions or render state services based on the right of operative management;
- g* certain budgetary non-commercial institutions; and
- h* other institutions and entities in certain cases provided by law.

According to Law No. 44-FZ, any legal entity, regardless of its form of incorporation, ownership type, place of business or place of origin of its capital, and any individual, including those registered as a self-employed entrepreneur, may be a procurement participant. Since August 2015, an exception to this rule exists that prohibits offshore companies from participating in procurement. The list of offshore territories is established by the Ministry of Finance. For more information regarding procurement participants, see Section VI.iii.

ii Regulated contracts

Government procurement rules regulate contracts for the supply of goods, carrying out of works and provision of services (including the acquisition of immovable property or lease of property).

There are specific rules with regard to utilities and defence procurement contracts, as well as to contracts in relation to provision of goods to be used in emergency situations. Specific rules also apply to:

- a* goods supplied for federal needs in accordance with federal and interstate target programmes;
- b* energy service agreements;
- c* communication services for the needs of public authorities, national defence, national security and law enforcement;

- d* development of drugs and psychotropic substances;
- e* agricultural products supplied for state needs;
- f* gas supplied for federal (or municipal) needs;
- g* scientific research and experimental development;
- h* educational services;
- i* production and distribution of national films;
- j* regular automobile and city electric transport transportation;
- k* design and exploration works or construction and reconstruction of capital construction projects;
- l* procurement of goods the manufacturing process of which has been established, modernised or developed in Russia; and
- m* some other procurements.

Concession agreements, privatisation and the provision of services by international financial institutions are not within the scope of the government procurement law. Concession agreements are regulated by Federal Law No. 115-FZ on Concession Agreements, dated 21 July 2005.

One innovation of Law No. 44-FZ is a type of service contract called a ‘life-cycle contract’, which allows for the establishment by the government of a contract providing for the procurement of goods or works, covering different stages of the life cycle of the object (design, construction, subsequent maintenance, operation, etc.). Under the previous regulation it was impossible to enter into one contract covering different types of works, and it was necessary to conduct a separate tender for each different type of works.

The provisions of Law No. 44-FZ do not provide for a competitive dialogue procedure, and in this respect the procurement rules are quite strict. Thus, the current legislation generally does not provide for the possibility of amending a draft public contract that is an integral part of procurement documentation at the stage of submission of bids. Bidders may only submit requests for clarification of documentation requirements. However, in certain cases stipulated by Law No. 44-FZ, the parties may agree to amend certain provisions of the public contract at the execution stage.

The amendment of material conditions in contracts following their execution is prohibited, except for the following amendments, which do not require a new procurement procedure: a change of contracting authority; a change of supplier in cases of legal succession; or a change of the contract price by mutual agreement as provided by Law No. 44-FZ in certain cases. An existing contract may only be transferred to another supplier without a new procurement procedure in the case of legal succession.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

Given that Law No. 44-FZ presumes the mandatory conclusion of public contracts without any amendments to contractual rights and obligations, framework agreements are not used in Russian procurements.

Contracting authorities are entitled to hold joint tenders or auctions in cases where they make purchases of the same goods, works and services. The authorities’ rights, duties and liabilities when holding joint tenders or auctions are to be defined by an agreement between

the relevant parties. A contract with the winner of a joint tender or auction is required to be concluded by each contracting authority. The government establishes the procedure for holding joint tenders and auctions.

According to the procurement legislation, for the purpose of centralised purchasing, the function of determining suppliers may be transferred to existing or specially created bodies (namely, state and municipal bodies or treasury enterprises). Under centralised purchasing, delegation of the functions of justifying purchases and determining the terms of a contract is not permitted, in particular for the fixing of the initial (maximum) price of a contract and the signing of the contract. Contracts must be signed by the contracting authority that procures the goods, services or works.

ii Joint ventures

Depending on the nature of the project, a company established by state public bodies may act in accordance with special legislative acts regulating their activity or under Law No. 223-FZ.

Procurement procedures stipulated by Federal Law No. 44-FZ are not applicable to public–private partnerships (PPPs). At present, PPP projects may be implemented under Federal Law No. 224-FZ on Public–Private Partnership, Municipal–Private Partnership in the Russian Federation and Amendments to Certain Regulatory Acts of the Russian Federation, dated 13 July 2015 (the PPP Law); or Federal Law No. 115-FZ on Concession Agreements, dated 21 July 2005, which provides for a two-stage tender procedure for awarding concessions: pre-qualification and evaluation of bids. The PPP Law, which came into force on 1 January 2016, has introduced a unified legal regime for the implementation of long-term infrastructure projects based on PPP agreements at the federal level. Previously, PPP agreements were structured based on the general rules of the Civil Code and regional legislation. The adoption of the PPP Law is a positive legislative development that has resolved problems arising from the prior lack of clear and uniform regulation of PPP agreements. Currently, there are discussions and legislative plans to improve the provisions of the PPP Law for the purpose of increasing the number of projects implemented under it.

V THE BIDDING PROCESS

i Notice

Public procurements must be published within a unified information system that is located on a designated website.² The content of the contract notice and terms for such notices will depend on the value of the contract, type of procurement procedure and other factors.

It is possible to place orders for goods, works or services without a procurement procedure or procurement publication in cases such as those set forth in Article 93 of Law No. 44-FZ (procurements from a sole supplier). Although in the area of procurements from a sole supplier there is generally no need for publication, there are some exceptions. For instance, there is a requirement to publish notices in relation to, *inter alia*:

- a* procurements of goods, works or services from the natural monopoly companies falling within the scope of Federal Law No. 147-FZ of 17 August 1995 on Natural Monopolies, as well as procurements of services of the central depository;

² www.zakupki.gov.ru.

- b* services in the areas of water supply, heat supply and gas supply (except for services related to the sale of liquefied gas); and
- c* services in the area of storing and importing or exporting narcotic agents and psychotropic substances.

The contracting authorities are obliged to publish their procurement plans for a three-year period and scheduled plans for each financial year based on their procurement plans.

ii Procedures

Where procurement regulations apply, contracting authorities must use one of the procedures prescribed by the relevant procurement regime. Procurements can be done through competitive methods of determining suppliers or from a sole supplier. Such competitive methods include:

- a* tenders (namely, public tender, tender with limited participation, two-stage tender, closed tender, closed tender with limited participation and closed two-stage tender);
- b* auctions (including closed auction);
- c* requests for quotations; and
- d* requests for proposals.

As of 2019, amendments to Law No. 44-FZ entered into force, obliging the contracting authorities to conduct all competitive procedures specified above in an electronic form. However, Law No. 44-FZ sets out an exhaustive list of exceptions (e.g., procurement from a sole source, procurement conducted in foreign countries and procurement conducted via closed procedures).

Electronic procedures (including filing applications for participation in procurement) and contracting are carried out through an electronic platform. Law No. 44-FZ provides a detailed regime for conducting electronic procurements.

The prevailing type of procurement procedure is an electronic auction. Procurement from a sole source means procurement from a particular supplier without a tender, which may be done in exceptional cases envisaged by Law No. 44-FZ. These exceptional cases include, for instance, the conclusion of the following contracts:

- a* the supply of Russian armaments and military equipment that have no Russian analogues and are made by the sole manufacturer, with the supplier of such armaments and military equipment;
- b* rendering services in relation to water supply, water discharge, heat supply and gas supply (except for the services related to the sale of liquefied gas);
- c* services in connecting to (cutting in) engineering networks at prices (tariffs) controlled in compliance with Russian legislation;
- d* storing, importing or exporting narcotic agents and psychotropic substances;
- e* the procurement of goods, works or services for an amount not exceeding 100,000 roubles, provided that the total annual volume of procurements, which the contracting authority may make pursuant to this provision, must not exceed 2 million roubles or 5 per cent of the aggregate annual volume of the authority's procurements and must not comprise more than 50 million roubles (it is noteworthy that the 100,000 roubles limitation does not apply to contracting authorities operating outside of Russia, such as diplomatic or trade missions, consular offices, etc.);

- f* the delivery of items of cultural value (including museum collections, rare and valuable editions, manuscripts and archival documents) intended to replenish state museum funds, libraries, archive funds, film and photo funds, as well as similar funds;
- g* the procurement of goods of which the manufacturing process has been established, modernised or developed in Russia, in accordance with a special investment contract, which is a new type of contract introduced in 2015 for the purpose of promoting national industry. The investor under such a contract must be approved by the government provided that certain conditions are met (e.g., the investment should equal or exceed 3 billion roubles);
- b* the procurement of legal services for protecting the interests of Russia in foreign and international courts and arbitral tribunals, and in the bodies of foreign states (introduced in 2017);
- i* the procurement of works relating to the modernisation of federal state information systems that provide informational and legal support to the Russian parliament, and services that support such systems (introduced in 2017); and
- j* some other exceptional cases provided by Law No. 44-FZ.

With effect from 1 July 2018, Law No. 223-FZ lists competitive and non-competitive procurement methods, but as opposed to the provisions of Law No. 44-FZ, the list is not exhaustive. A procurement policy, established in accordance with Law No. 223-FZ, may set forth other competitive methods aside from tenders, auctions, requests for quotations and requests for proposals, provided that such methods comply with the conditions established by Law No. 223-FZ. Non-competitive methods, in turn, include methods that do not comply with these conditions (e.g., procurements from a sole supplier). Similarly to Law No. 44-FZ, competitive procurement procedures under Law No. 223-FZ must be held in an electronic form, unless otherwise stipulated in the procurement policy. Competitive procurement procedures under Law No. 223-FZ whose participants are limited to small- and medium-sized businesses must be held in an electronic form only.

All procurement policies adopted in accordance with Law No. 223-FZ had to be brought in line with the current version of Law No. 223-FZ and published in the unified information system by 1 January 2019. Procurement policies that do not comply with Law No. 223-FZ after this date are deemed to be not published and, therefore, may not be used for holding procurement procedures.

iii Amending bids

A bidder is entitled to modify or withdraw its application before the expiry of the period for filing applications, subject to the provisions of Law No. 44-FZ. In these cases, a tender participant or auction participant does not forfeit the right to the monetary assets provided to secure the application thereof. The modification of an application or a notice of its withdrawal is deemed valid before the expiry of the period for filing applications. In relation to requests for quotations, a bidder is entitled to change or withdraw its application for participation in the request only if the contracting authority has amended the notice making the request for quotations. Once the period for filing applications has expired, no changes to the bid may be made.

VI ELIGIBILITY

i Qualification to bid

There are two types of procurement procedures depending on whether they are one-stage or two-stage tenders. A separate pre-qualification stage is used in most tenders (tenders with limited participation, two-stage tenders, closed tenders with limited participation and closed two-stage tenders). The winner in the latter case is determined during the second stage of the tender from the bidders who passed the pre-qualification stage.

In any type of procurement procedure, the procurement commission must first verify whether a bidder meets mandatory unified requirements and any mandatory additional requirements established by the government.

Thus, a bidder may be excluded when the supplier is being determined, or the conclusion of a contract with the winning supplier may be cancelled at any time prior to concluding the contract if the contracting authority or procurement commission finds that the bidder does not satisfy mandatory unified and additional requirements, or has provided unreliable data in respect of satisfying the requirements.

Unified requirements include, in particular, the following:

- a* satisfaction of the requirements established in compliance with the legislation of Russia for persons engaged in the supply of the goods, carrying out of the work and the provision of the services that are the object of the procurement;
- b* a bidder shall not be in the process of liquidation, and there must be no decision of a court declaring a bidder bankrupt and initiating bankruptcy proceedings;
- c* a bidder's activities are not suspended in accordance with the Code of Administrative Offences of the Russian Federation as of the date of filing an application for participation in purchases;
- d* a bidder shall have no arrears on taxes, fees, debts or other mandatory payments to budgets of the budget system of Russia;
- e* a bidding individual or the general director, members of the board of directors or chief accountant of a bidding legal entity have not been subject to criminal liability for certain crimes related to economic activities;
- f* a bidder that is a legal entity has not been subject to administrative liability in accordance with the Code of Administrative Offences for illegal gratification of an official on behalf of a legal entity;
- g* a bidder possesses the necessary intellectual property rights in case, as a result of the procurement, the contracting authority shall acquire such rights;
- h* the absence of any conflict of interests, etc., between bidders and the contracting authority; and
- i* a bidder is not an offshore company.

The contracting authority may also establish a requirement for the exclusion of any bidder that is included in the register of unfair suppliers maintained by the FAS.

The government is entitled to establish additional mandatory requirements for participants in procurements of certain kinds of goods, works and services that are procured by way of tenders (except for public and closed tenders) or auctions, in particular for the availability of the following:

- a* financial resources for a contract's execution;
- b* equipment and other material resources for a contract's execution held under ownership or on other legal grounds;

- c* work experience connected with the subject of a contract and business reputation; and
- d* a required number of specialists and other employees with a definite qualification level for a contract's execution.

The government is also entitled to establish additional mandatory requirements for participants in procurements of audit and related services and consulting services. These additional requirements have been elaborated and are expected to be adopted.

In Russia, much attention is given to compliance with formal requirements. Thus, in practice, the bidder may be disqualified if the application does not comply with all formal requirements or if certain documents are missing even when the bidder substantially meets all requirements.

ii Conflicts of interest

Law No. 44-FZ prohibits participation in procurement commissions by persons that have a personal interest in the results of the procurement or that may be influenced by a bidder.

In particular, the following persons cannot act as members of a procurement commission:

- a* individuals who were involved as experts in respect of the procurement documentation;
- b* individuals personally interested in the results of the selection of suppliers;
- c* individuals who are influenced by the procurement participants (member or shareholder of a relevant organisation, member of governing bodies, creditor, etc.);
- d* individuals married to the head of a procurement participant; or
- e* individuals who are members of the procurement control authority.

In the event that any member of a procurement commission is found to fall within any of the categories set out above, that member must immediately be replaced by another person.

Commission members may only be replaced by the decision of the contracting authority that adopted the decision on the establishment of the commission.

iii Foreign suppliers

Generally, contracting authorities can accept bids from foreign suppliers provided that they comply with the qualification criteria. There is no requirement to set up a representative office or a subsidiary in the territory of Russia for the purpose of bidding. However, the participation of foreign suppliers may be restricted in a procurement if the procurement involves state secrecy. In addition, according to Law No. 44-FZ only Russian legal entities may participate in tenders for entering into a state contract envisaging mutual investment undertakings of a supplier or investor to establish, modernise or develop the manufacturing of goods in the territory of one of the Russia's regions. This type of investment contract has been introduced with a view to support the national industry and manufacturing. Such a contract must provide for an investment amount of no less than 1 billion roubles and must be entered into for a period of no longer than 10 years. With regard to national interest issues, see Section VII.ii.

VII AWARD

i Evaluating tenders

The procurement documentation (in the case of tenders and auctions) along with the information specified in a notice of holding a procurement must also contain the criteria for the evaluation of bids, the weighting of these criteria and the procedure for consideration and assessment of bids in compliance with Law No. 44-FZ.

The process of the assessment of bids in relation to all procurements, except for auctions, requests for quotations, sole-supplier procurements and certain requests for proposals, is based on value and non-value assessment criteria. Value criteria include price, costs for operation and repair or life-cycle value (if applicable), and non-value criteria include qualitative, functional and environmental characteristics of the procurement object and qualification of the bidders. The latter refers to, in particular, the existence of financial resources, equipment and other material resources held by them under ownership or on some other legal grounds; work experience connected with the subject of a contract and business reputation; and specialists and other employees holding a specific level of qualification. To determine the winner, the use of at least two criteria is required, provided that price is one of these.

The legislation specifies the weightings for the assessment criteria. The sum of the respective weightings for the assessment criteria must total 100 per cent. Thus, the proportion of minimum value to maximum non-value criteria is generally 70:30 in relation to procurement of goods, and 60:40 in relation to procurement of works and services. However, there are certain exceptions. Thus, the proportion of 40:60 is established, for instance, for such goods, works and services as the performance of emergency rescue works, restoration of cultural heritage objects, and provision of medical, educational and legal services. In the case of creating and developing state (municipal) information systems and official websites, a 30:70 proportion applies, and in the case of scientific research works, 20:80.

ii National interest and public policy considerations

Under the procurement regulations, national interest can only be taken into consideration to a limited extent. Equal treatment and non-discrimination of suppliers is presumed. However, Russian suppliers may be granted certain advantages over foreign suppliers in certain cases in accordance with Article 14 of Federal Law No. 44-FZ.

Law No. 44-FZ establishes the following regimes for the admission of foreign goods, works and services to procurements:

- a* national regime: applies when and where the international agreements of Russia so provide; within the framework of the WTO, the application of the national regime will depend on the accession of Russia to the GPA and the conditions of that accession;
- b* prohibition or limitation of admission: established by the government to guarantee national defence and state security to protect the fundamentals of the constitutional system, internal market and the development of the Russian economy and to support Russian manufacturers. It is worth noting that some of the prohibitions or limitations currently in force do not apply to suppliers coming from Eurasian Economic Union Member States; and
- c* admission conditions: established by the Ministry of Economic Development upon the government's instruction.

Environmental considerations have become more important in recent years, although there is still generally little knowledge of how such considerations can best be taken into account in public procurements. There is as yet no wide practising of 'green' procurement in Russia. However, Law No. 44-FZ introduced new criteria for bid evaluation (ecological characteristics of the procurement object), which is a first step towards establishing a system of green public procurement.

VIII INFORMATION FLOW

In Russia, access to information about the contractual system in the area of procurement is required to be unimpeded and free of charge. The openness and transparency of this information is to be ensured, in particular, by way of its placement in the unified information system. The information required by Law No. 44-FZ to be placed in the unified information system must be full and reliable. Data constituting a state secret are not published in the unified information system. From 31 December 2017, entities falling within the scope of Law No. 223-FZ may introduce corporate information systems connected with the unified information system. These systems exchange information and, in the event of any discrepancies, the information in the unified information system prevails.

Based on the principles of transparency and ensuring competitive procedures, the contracting authority must provide all procurement participants with the same information and inform them about the proceedings of a public procurement. The procurement participants are entitled to receive clarifications regarding the provisions of procurement documentation.

It is a legal obligation of the tender commission to inform any unsuccessful bidders of the name of the successful competitor, the reasons for the rejection of the bid and the earliest date of the conclusion of the contract. However, there is no requirement to be specifically notified – the publication of the minutes of the tender commission regarding the procurement procedures is sufficient. Once the winner has been determined, the commission should publish the minutes of the bid evaluation no later than the day following the expiry of the period for consideration of applications by the commission.

Bidders are not granted access to the comprehensive procurement file (encompassing all procurement documents, submitted bids and proposals, all evaluation materials, score sheets and all other documentation related to or prepared in conjunction with evaluation, negotiation and the award process). However, they are granted access to the procurement documentation and minutes of decisions taken by the procurement commission, and can check the registers of concluded contracts.

Further, contracting authorities must 'stand still' for a certain period; for example, in the case of electronic auctions or tenders, a contract may not be concluded until 10 days after the date of the publication in the unified information system of a protocol with the results of an electronic auction. This period allows unsuccessful bidders time to bring claims to prevent the contract award if they consider the award decision to be unlawful.

There are confidentiality obligations in relation to personal data and other types of data (e.g., commercial secrecy) in cases stipulated by federal law. The data constituting a state secret must not be published in the unified information system. Specific obligations to ensure confidentiality of information apply in the field of defence and security.

IX CHALLENGING AWARDS

i Procedures

There are two key procedures for reviewing complaints:

- a administrative review through the authorised state body dealing with such claims, the Federal Antimonopoly Service. In relation to the procurement procedure for state defence orders or other federal needs that deal with state secrets, the Federal Service on Defence Orders is the body for reviewing complaints; and
- b court review through state *arbitrazh* courts.

Complaints regarding the actions (or inaction) of the contracting authority and procurement commissions can be filed no later than 10 days from the date of posting the minutes with the results of assessments of bids by the contracting authority on the official website except for certain cases established by Law No. 44-FZ.

Administrative review takes up to five business days. A copy of a decision taken as a result of an administrative review is published and sent to the interested parties within three business days of the decision being taken.

The deadline for court review of administrative decisions taken under administrative review is three months from the date of the decision.

Court appeals may be filed within three years from the date the applicant finds out or should have found out that his or her rights were violated (including for claims for the application of consequences of contract invalidity).

Court reviews must be performed within a 'reasonable time', which is determined based on the specific nature of each case. In practice, a first-level judicial review usually takes up to three months.

ii Grounds for challenge

Any procurement participant that believes a violation of the public procurement procedure has taken place may file an application for administrative review (complaint) or submit a claim to court. The application or claim should include certain information and needs to be accompanied by documents evidencing the grounds for the claim. Authorised state bodies may also submit applications and claims in the event of violations of the procurement legislation on a general basis.

iii Remedies

An application for review does not lead to an automatic suspension of the procurement procedure or the conclusion of the contract; however, the antimonopoly authorities are entitled to suspend the procurement process until the application for review is examined. In the event of court proceedings, the claimant can apply to a court for the adoption of injunctive measures, which include the suspension of the conclusion of the contract.

Upon review of the complaint, the FAS can either issue a binding order to the affected contracting entity (including obliging it to rectify the relevant violations) or cancel the results of the procurement procedure.

A concluded contract may be cancelled by a court decision if the court rules that the procurement procedure that led to the conclusion of the contract violated procurement law.

The current legislation provides for various penalties for the breach of the procurement legislation by contracting authorities (or their officers) depending on the procurement law

breached and the character of the administrative offence. Procurement participants may bear criminal liability, liability in accordance with antimonopoly laws or liability for the non-performance of the relevant contracts provided that material harm has been inflicted on the interests of the state and society.

X OUTLOOK

Law No. 44-FZ came into force on 1 January 2014 and represents a progressive step in improving regulation of government procurement. This Law also requires the adoption of a significant amount of new subordinate legislation and government regulations to put a new contractual system into successful operation. A number of new legal acts have been issued, and the work on adopting the appropriate regulations in Russia is ongoing. There are also certain initiatives to amend procurement legislation.

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